

THE INFORMATION IN THIS BOX IS NOT A PART OF THE CONTRACT AND IS FOR COUNTY USE ONLY



Contract Number  
**24-1006**



SAP Number  
N/A

### Assessor-Recorder-County Clerk

<b>Department Contract Representative</b>	Yvonne Robbins, Departmental Information System Administrator
<b>Telephone Number</b>	(909) 382-3254
<b>Contractor</b>	SmartBear
<b>Contractor Representative</b>	Jack Crawshaw
<b>Telephone Number</b>	(857) 340-5674
<b>Contract Term</b>	Effective 10/22/24 and continuing until terminated by either party
<b>Original Contract Amount</b>	Non-financial in nature
<b>Amendment Amount</b>	Non-financial in nature
<b>Total Contract Amount</b>	Non-financial in nature
<b>Cost Center</b>	N/A
<b>Grant Number (if applicable)</b>	N/A

**Briefly describe the general nature of the contract:** *The SmartBear Terms of Use Agreement provides general terms and conditions for use of SmartBear software and service offerings. This Agreement is non-financial in nature and does not commit the County to make any purchases.*

**FOR COUNTY USE ONLY**

<p>Approved as to Legal Form</p> <p></p> <p>Kenneth Brown, Deputy County Counsel</p> <p>Date <u>10/3/24</u></p>	<p>Reviewed for Contract Compliance</p> <p>_____</p> <p>Date _____</p>	<p>Reviewed/Approved by Department</p> <p></p> <p>Chris Wilhite, Assessor-Recorder-County Clerk</p> <p>Date <u>10/3/2024</u></p>
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# SmartBear Terms of Use

*Effective starting February 8, 2023*

These SmartBear Terms of Use ("Agreement") is a binding agreement between Customer, as defined below, and SmartBear and takes effect on the Effective Date. This Agreement governs software and service offerings.

BY ACCESSING OR USING THE SAAS, DOWNLOADING, INSTALLING, OR USING THE ON-PREMISE SOFTWARE, OR BY SIGNING THIS AGREEMENT, INCLUDING BY ACCEPTING IT ELECTRONICALLY, CUSTOMER (I) ACKNOWLEDGES THAT IT HAS READ, UNDERSTOOD, AND ACCEPTS THIS AGREEMENT; (II) REPRESENTS AND WARRANTS THAT IT HAS THE RIGHT, POWER, AND AUTHORITY TO ENTER INTO THIS AGREEMENT; (III) ACCEPTS AND AGREES THAT IT IS LEGALLY BOUND BY THIS AGREEMENT AND (IV) REPRESENTS AND WARRANTS THAT THE PERSON ACCEPTING THIS AGREEMENT HAS BEEN AUTHORIZED TO DO SO ON CUSTOMER'S BEHALF. THE PERSON EXECUTING THIS AGREEMENT ON CUSTOMER'S BEHALF REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS AND CONDITIONS.

IF YOU DO NOT ACCEPT THIS AGREEMENT, DO NOT ACCESS OR USE THE SAAS OR DOWNLOAD, INSTALL OR USE THE ON-PREMISE SOFTWARE.

## 1. DEFINITIONS

1.1 "AUP" means the acceptable use policy located at <https://www.smartbear.com/AUP/>, as may be amended from time to time, which is incorporated herein by reference.

1.2 "Authorized User" means Customer and Customer's employees, consultants, contractors, and agents:

1.2.1 who are authorized by Customer to access to the SaaS or use of the On-Premise Software subject to the license restrictions pursuant to this Agreement;

1.2.2 for whom access to the SaaS or use of the On-Premise Software has been purchased hereunder in accordance with the applicable Order.

1.3 "Confidential Information" means any information, business plan, concept, idea, know-how, process, technique, program, design, formula, prototype, algorithm, specifications, design plans, software documentation or work in process, any engineering, manufacturing, marketing, pricing, technical, financial, data, or sales information, or any information regarding suppliers, customers, employees, investors, or business operations, and any other information or materials, whether in written, or graphic, or any other form or that is and whether disclosed orally, or electronically, whether tangible or intangible and in whatever form or media provided, whether or not designated as "Confidential", "Proprietary" or some similar designation if by the substance of the disclosure or the circumstances surrounding the disclosure, the information would be reasonably considered confidential or proprietary, or otherwise which is learned or disclosed in the course of discussions, studies, or together work undertaken between the parties.

1.4 "Customer Data" means information, data, and other content, in any form or medium, that is submitted, posted, or otherwise transmitted by Customer or its Authorized Users or on Customer's behalf through the SaaS or the applicable support portal.

1.5 "Customer" means the person or entity accessing the SaaS or purchasing the On-Premise Software.

1.6 "De-identified Data" has the meaning given in Section 5.2 below.

1.7 "DPA" or "Data Processing Addendum" means the data processing addendum located at <https://www.smartbear.com/DPA/> as may be amended from time to time, which is incorporated herein by reference.

1.8 "Documentation" means SmartBear's user manuals, handbooks, and guides relating to the SaaS or the On-Premise Software provided by SmartBear to Customer either electronically or on SmartBear's website.

1.9 "Effective Date" means the earlier of (a) the date when Customer first accesses or uses the SaaS or downloads, installs, or uses the On-Premise Software or (b) the date when Customer signs or otherwise accepts this Agreement, or as otherwise specified in the applicable Order.

1.10 "Feedback" means any suggestion or idea for improving or otherwise modifying any of SmartBear's products or services. Feedback does not include any suggestion or idea to the extent that it solely addresses Customer's products or services.

1.11 "Fees" means fees as described in the applicable Order.

1.12 "Initial Maintenance Term" means the initial maintenance term specified in the applicable Order.

1.13 "Initial Term" means the term specified in the applicable Order.

1.14 "International Trade Laws" means any applicable (i) Sanctions; (ii) U.S. export control Laws (including, without limitation, the International Traffic in Arms Regulations (22 CFR §§ 120-130, as amended), the Export Administration Regulations (15 CFR §§ 730-774, as amended) and any regulation, order, or directive promulgated, issued or enforced pursuant to such laws; (iii) laws pertaining to imports and customs, including those administered by the Bureau of Customs and Border Protection in the U.S. Department of Homeland Security (and any successor thereof) and any regulation, order, or directive promulgated, issued or enforced pursuant to such Laws; (iv) the anti-boycott laws administered by the U.S. Department of Commerce and the U.S. Department of the Treasury and (v) export, import and customs laws of other countries in which Customer has conducted and/or currently conducts business.

1.15 "Maintenance and Support Services" means the support set forth in SmartBear's Product Support Manual as it exists from time to time located at <https://support.smartbear.com/support/media/pdf/SSG.pdf>. In addition, as part of the Maintenance and Support Services, SmartBear may make available bug lists and other supplemental materials. SmartBear makes no representations or warranties of any kind for these materials.

1.16 "On-Premise Software" has the meaning given in Section 3.1 below.

1.17 "Order" means an order form, quote, invoice, or other document issued by SmartBear and executed or accepted by Customer, including electronically, describing the SaaS or On-Premise Software ordered, the Initial Term and Renewal Term of Customer's subscription or license, the Initial Maintenance Term and Renewal Maintenance Term (if applicable), and any additional terms agreed to by the parties.

1.18 "Renewal Maintenance Term" has the meaning set forth in the applicable Order.

1.19 "Renewal Term" means the term for the SaaS or On-Premise Software commencing upon expiration of the Initial Term.

1.20 "SaaS" has the meaning given in Section 2.1 below.

Commerce), the United Nations Security Council, the European Union, HM's Treasury of the United Kingdom or any other relevant governmental authority.

**1.22 "SmartBear" means:**

1.22.1 If Customer acquired the SaaS or On-Premise Software in the United States or Canada: SmartBear Software Inc., a Delaware corporation, with its principal place of business at 450 Artisan Way, Somerville, MA 02145 or the affiliate listed in the applicable Order.

1.22.2 If Customer acquired the SaaS or On-Premise Software outside of the United States or Canada: SmartBear (Ireland) Limited, with its principal place of business at Mayoralty House, Flood Street, Galway, Ireland, or the affiliate listed in the applicable Order.

**1.23 "SmartBear Assets" means the SaaS, On-Premise Software, Documentation, and all other software, other technology, works of authorship, and other assets owned or licensed by SmartBear.**

**1.24 "Subscription Term" means the term specified in the applicable Order.**

**1.25 "Third-Party Claim" means an actual (not only threatened) third-party claim, suit, action, or proceeding.**

**1.26 "Usage Data" has the meaning given in Section 5.3 below.**

**1.27 "Warranty Period" means either:**

1.27.1 For the SaaS, one (1) year after Customer's initial access to the SaaS; or

1.27.2 For On-Premise Software, ninety (90) days after delivery of the On-Premise Software to Customer.

**2. SAAS SPECIFIC TERMS**

**2.1 Access to the SaaS.** "SaaS" means SmartBear's software-as-a-service offering(s) identified on the Order. SmartBear hereby grants Customer and its Authorized Users the right to access and use the SaaS during the Subscription Term solely for Customer's internal business operations in accordance with the terms and conditions herein and the restrictions set forth for the SaaS type applicable to Customer's subscription located at <https://smartbear.com/legal/software-license-and-services-types/>. SmartBear shall provide Customer, upon the Effective Date (or as otherwise agreed in the applicable Order) the necessary passwords and access credentials to allow Customer and its Authorized Users to access the SaaS.

**2.2 Account Use.** Customer is responsible and liable for all uses of the SaaS resulting from Customer's access to the SaaS and from access provided to others by Customer, directly or indirectly, whether or not such access or use is permitted by this Agreement. Without limiting the generality of the foregoing, Customer is responsible for all acts and omissions of Authorized Users, and any act or omission by an Authorized User that would constitute a breach of this Agreement if taken by Customer will be deemed a breach of this Agreement by Customer. Customer shall comply, and shall ensure all Authorized Users comply, with all terms and conditions of this Agreement, all applicable laws, rules, regulations, guidelines, standards, and the AUP.

**2.3 Passwords and Access Credentials.** Customer is responsible for keeping passwords and access credentials associated with the SaaS confidential. Customer will not sell or transfer them to any person or entity other than Customer's Authorized Users. Customer shall promptly notify SmartBear about any unauthorized access to Customer's passwords or access credentials.

**3. ON-PREMISE SOFTWARE SPECIFIC TERMS**

**3.1 License Grant.** "On-Premise Software" means SmartBear's on-premise software identified in the Order. SmartBear grants to Customer a non-transferable, non-exclusive, non-assignable, revocable, royalty-free license to use the On-Premise Software in object code form on Customer's premises for its internal business purposes in accordance with this Agreement, specifically including Section 4.1 (*Use Restrictions*), the applicable Order, and the restrictions set forth for the software license type applicable to Customer's license located at <https://smartbear.com/legal/software-license-and-services-types/>.

**3.2 No Sale or Other Rights.** Copies of the On-Premise Software created or transferred pursuant to this Agreement are licensed, not sold, and Customer receives no title to or ownership of the On-Premise Software itself or any copy. Furthermore, Customer receives no rights to the On-Premise Software other than those specifically granted in in Section 3.1 above (*License Grant*).

**3.3 Delivery.** SmartBear shall deliver the On-Premise Software to Customer by email or other electronic means. Delivery is deemed to have occurred when the On-Premise Software has been made available to Customer for download.

**3.4 Virtualization.** The On-Premise Software may be installed within a virtual (or otherwise emulated) hardware system as long as (a) the use of the On-Premise Software meets the terms of the license type Customer purchased and (b) the virtual machines are run on hardware owned or leased by Customer. Virtualization technology may not be used to circumvent licensing terms or restrictions.

**3.5 Backup Copy.** Customer may make one copy of the On-Premise Software for the sole purpose of backing-up and archiving the On-Premise Software. Any such copy of the On-Premise Software is subject to all terms and conditions of this Agreement, including applicable license restrictions, and must contain the same titles, trademarks, and copyrights as the original.

**4. SOFTWARE RESTRICTIONS**

**4.1 Use Restrictions.** Customer shall not, and shall not permit any Authorized Users to, use the SaaS or the On-Premise Software, any software component of the SaaS or On-Premise Software, or the Documentation for any purposes beyond the scope of the rights granted in this Agreement and the terms of any Order provided by SmartBear. Customer shall not, and shall not permit any Authorized Users to, at any time, directly or indirectly:

4.1.1 copy any features, functions or graphics of the SaaS, On-Premise Software, or any software component;

4.1.2 modify or create derivative works of all or any part of the SaaS, On-Premise Software, any software component, or the Documentation;

4.1.3 rent, lease, lend, sell, license, sublicense, assign, distribute, publish, transfer, or otherwise make available the SaaS, the On-Premise Software, any software component, or any Documentation except as expressly permitted under this Agreement;

4.1.4 reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to any software component of the SaaS or the On-Premise Software, in whole or in part;

4.1.5 access or use the SaaS, On-Premise Software, or any software component in order to build a competitive product or service; or

4.1.6 remove any proprietary notices from the SaaS, On-Premise Software or Documentation.

**4.2 AUP.** In addition, Customer shall comply with the AUP.

**5. CUSTOMER DATA**

Software to Customer. Customer shall ensure that Customer Data and any Authorized User's use of Customer Data does not violate any policy or terms referenced in or incorporated into this Agreement or any applicable law. Customer is solely responsible for the development, content, operation, maintenance, and use of Customer Data. Customer warrants that Customer owns all right, title, and interest, including all intellectual property rights, in and to Customer Data and that both the Customer Data and Customer's use of the SaaS or On-Premise Software complies with the AUP. Customer is responsible for obtaining all necessary rights, consents, and permissions necessary or useful to enable SmartBear to use, provide, store, and otherwise process Customer Data, and Customer grants such rights and permissions to SmartBear.

**5.2 De-identified Data.** SmartBear may use, reproduce, or otherwise exploit De-identified Data (as defined below) in any way, in its sole discretion, including, but not limited to, aggregating such data with third party data, optimizing resources and support, research and development, and automating processes that enable continuous improvement, performance, optimization and development of new products and services. Customer recognizes and agrees that De-identified Data is the property of SmartBear. "De-identified Data" refers to Customer Data with the following removed: information that identifies or could reasonably be used to identify an individual person, a household, or Customer.

**5.3 Usage Data.** "Usage Data" refers to non-confidential (a) new information generated through analysis and other processing of Customer Data and (b) technical and usage information generated through monitoring or other observation of Customer's and its users' use of the SaaS or On-Premises Software. Customer recognizes and agrees that Usage Data is the property of SmartBear.

**5.4 Excluded Data.** Customer represents and warrants that Customer Data does not and will not include, and Customer has not and shall not upload or transmit to SmartBear's SaaS, On-Premise Software, computers or other media, any data (a) in Customer's production environments (as opposed to testing environments), (b) to be used in military or nuclear applications, (c) regulated pursuant to Health Insurance Portability and Accountability Act of 1996, as amended, or the Payment Card Industry Data Security standards from the Payment Card Industry Data Security Standards Council (the "Excluded Data Laws"), or (d) that would constitute special category or sensitive personal data under the General Data Protection Regulation or other applicable privacy laws (collectively, "Excluded Data"). CUSTOMER RECOGNIZES AND AGREES THAT:

5.4.1 SMARTBEAR HAS NO LIABILITY FOR ANY FAILURE TO PROVIDE PROTECTIONS SET FORTH IN THE EXCLUDED DATA LAWS OR OTHERWISE TO PROTECT EXCLUDED DATA; AND

5.4.2 SMARTBEAR'S SYSTEMS ARE NOT INTENDED FOR MANAGEMENT OR PROTECTION OF EXCLUDED DATA AND MAY NOT PROVIDE ADEQUATE OR LEGALLY REQUIRED SECURITY FOR EXCLUDED DATA.

## 6. INTELLECTUAL PROPERTY RIGHTS

**6.1 Intellectual Property Ownership.** As between Customer and SmartBear, SmartBear owns all right, title, and interest, including all intellectual property rights, in and to the SaaS, On-Premise Software, and Documentation.

**6.2 License to Documentation.** Subject to the terms and conditions contained in this Agreement, SmartBear hereby grants Customer a non-exclusive, non-sublicensable, revocable, non-transferable license for Customer's Authorized Users to use the Documentation solely for Customer's internal business purposes in connection with Customer's use of the SaaS or On-Premise Software.

**6.3 Feedback.** SmartBear has not agreed to and does not agree to treat as confidential any Feedback (as defined above) Customer provides to SmartBear, and nothing in this Agreement or in the parties' dealings arising out of or related to this Agreement will restrict SmartBear's right to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer. Notwithstanding Section 9 (*Confidentiality*), Feedback will not be considered Customer's Confidential Information or its trade secret.

**6.4 Roadmaps.** Customer recognizes and agrees that any information presented or disclosed to the Customer regarding new or upgraded features, product upgrades, patches, bug fixes, or upcoming products (collectively, "Roadmaps") is for information purposes only, and SmartBear is not required to deliver or implement any future updates, fixes, or other Roadmaps. Roadmaps are SmartBear's Confidential Information.

**6.5 Reservation of Rights.** SmartBear reserves all rights related to SmartBear Assets not expressly granted to Customer in this Agreement. Except for the limited rights and licenses expressly granted under this Agreement, nothing in this Agreement grants, by implication, waiver, estoppel, or otherwise, to Customer or any third party, any intellectual property rights or other right, title, or interest in or to the SmartBear Assets.

## 7. TERM AND TERMINATION

**7.1 Agreement Term.** The term of the Agreement shall commence upon Effective Date and shall continue until terminated in accordance with this Agreement. Termination or expiration of an Order does not terminate the Agreement; provided that either party may terminate this Agreement upon no less than one hundred and twenty (120) days' prior written notice to the other party for any reason if at such time there are no outstanding Orders then currently in effect; provided Customer may not terminate pursuant to this sentence if it owes any outstanding Fees.

**7.2 Term for SaaS or Software.** The Initial Term for Customer's use of the SaaS or On-Premise Software will commence when SmartBear grants access to the SaaS or upon delivery of the On-Premise Software, as applicable. The end of the Initial Term and the periods for Renewal Terms for the SaaS or On-Premise Software will be set forth in the applicable Order. At the end of the Initial Term, the SaaS or On-Premise Software term will automatically renew, at the then-current and then-applicable subscription price for such SaaS or On-Premise Software, for the Renewal Term set forth in the Order, unless either party delivers written notice of non-renewal to the other party at least one hundred twenty (120) days prior to the end of the then-current Initial Term or Renewal Term. Notwithstanding the foregoing, if the applicable Order grants a perpetual license to On-Premise Software, the license will become perpetual upon full payment of the license fees for such On-Premise Software listed in the Order.

### 7.3 Termination.

7.3.1 Notwithstanding anything contained herein to the contrary, this Agreement may be terminated:

7.3.1.1 by either party for cause by written notice, without opportunity to cure, in the event that: (a) the other party fails to function as a going concern; (b) a receiver, trustee, or other custodian for the other party or its assets is appointed, applied for, or consented to; (c) the other party becomes insolvent or unable to pay its debts as they mature in the ordinary course; (d) the other party makes an assignment for the benefit of creditors; (e) the other party is liquidated or dissolved; or (f) any proceedings are commenced by or against the other party under any bankruptcy, insolvency, or debtor's relief law and not dismissed within 60 days.

7.3.1.2 by either party if the other party materially breaches this Agreement and fails to cure such breach within thirty (30) days following receipt of written notice thereof; or

the terms and conditions of this Agreement shall continue to apply to such Order.

7.3.3 Termination does not restrict either party from pursuing any remedies available to it, including injunctive relief, or relieve Customer of its obligation to pay all fees that have already accrued or become payable hereunder.

7.3.4 Any right, obligation, or required performance of the parties in this Agreement which, by its express terms or nature is intended to survive termination of this Agreement, will survive any such termination.

## 8. FEES AND PAYMENT

8.1 Fees. Customer shall pay SmartBear the Fees on the dates specified in the applicable Order. All payment obligations are non-cancelable and non-refundable, and Customer will not, except as expressly provided herein, be entitled to a refund of any amounts paid for the SaaS, On-Premise Software, Maintenance and Support Services, or any other amounts for any reason.

8.1.1 Except as otherwise stated herein or in an Order, SmartBear may increase its Fees, including subscription and maintenance fees, no more frequently than once per calendar year and by an amount not to exceed SmartBear's prevailing prices to its customers generally for the applicable software or services. The foregoing notwithstanding, if the Initial Term or Initial Maintenance Term, as applicable, is two years or longer, yearly Fee increases will not begin until the start of the first Renewal Term. SmartBear shall give Customer written notice of any increase at least 30 days before the increase goes into effect.

8.1.2 The licensing parameters, number of units, Fees, and time period purchased in the applicable Order cannot be decreased during the term of the Order. For subscriptions to the SaaS, all monthly subscription fees shall be paid in advance of the subscription period to which such payment relates. If a payment date is not otherwise specified in the applicable Order, Customer shall pay all Fees within thirty (30) days from the invoice date, without offset or deduction. Customer shall make all payments in the applicable currency on or before the due date.

8.1.3 If Customer fails to make any payment when due, without limiting SmartBear's other rights and remedies:

8.1.3.1 SmartBear may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable law;

8.1.3.2 Customer shall reimburse SmartBear for all reasonable costs incurred by SmartBear in collecting any late payments or interest, including attorneys' fees, court costs, and collection agency fees; and

8.1.3.3 SmartBear may suspend access to the SaaS or On-Premise Software in accordance with Section 8.3 below (*Suspension*).

8.1.4 All Fees and other amounts payable by Customer under this Agreement are payable without deduction and are net of any tax, tariff, duty, or assessment imposed by any government authority (national, state, provincial, or local), including any sales, use, excise, ad valorem, property, withholding, or value added tax withheld at the source. If applicable law requires withholding or deduction of such taxes or duties, Customer shall separately pay SmartBear the withheld or deducted amount. For clarity, Customer is not responsible for any taxes imposed on SmartBear's income.

8.2 Support Fees. If Customer purchased a subscription to the SaaS, Maintenance and Support Services are provided without additional charge as part of Customer's subscription to the SaaS. If Customer purchased a license to use the On-Premise Software, Maintenance and Support Services are provided in consideration of payment of applicable annual maintenance and support fees. Maintenance and Support Services for On-Premise Software commence upon delivery of the On-Premise Software. Thereafter, the Initial Maintenance Term automatically renews, at the then-current and then-applicable annual maintenance fee, for subsequent one-year periods unless one party gives the other written notice of non-renewal at least one hundred and twenty (120) days before the end of the Initial Maintenance Term or the then-current Renewal Maintenance Term.

### 8.3 Suspension.

8.3.1 Notwithstanding anything to the contrary in this Agreement, SmartBear may temporarily suspend Customer's and any other Authorized User's access to any portion or all of the SaaS or On-Premise Software if:

8.3.1.1 there is a threat or attack on the SaaS or On-Premise Software that SmartBear reasonably believes may compromise the data of SmartBear's customers;

8.3.1.2 Customer or any other Authorized User is using the SaaS or On-Premise Software in violation of the AUP; or

8.3.1.3 there is a material breach of this Agreement or the applicable Order by Customer, including failure to pay for the SaaS or On-Premise Software.

8.3.2 SmartBear shall use commercially reasonable efforts: (a) to provide written notice of any suspension to Customer; and (b) to resume providing access to the SaaS or On-Premise Software as soon as reasonably possible after the event giving rise to the suspension is cured. SmartBear will have no liability for any damage, liabilities, losses (including any loss of or profits), or other consequences that Customer or any other Authorized User may incur as a result of a suspension.

## 9. CONFIDENTIALITY

9.1 Confidential Information. From time to time, each party may disclose Confidential Information to the other party. The receiving party shall not disclose the disclosing party's Confidential Information to any person or entity, except to the receiving party's employees, agents, or subcontractors who have a need to know the Confidential Information for the receiving party to exercise its rights or perform its obligations hereunder and who are required to protect the Confidential Information in a manner no less stringent than required under this Agreement. The receiving party shall protect the disclosing party's Confidential Information using the same care as the receiving party uses to protect its own Confidential information of similar importance, but in no event will the receiving party use less than reasonable care. The receiving party shall only use the disclosing party's Confidential Information to perform its obligations and exercise its rights under this Agreement. The parties agree that their mutual covenant not to disclose or use Confidential Information of the disclosing party shall not apply to any information to the extent that the information:

9.1.1 is, or at any time becomes a part of the public domain through no act or omission of the receiving party;

9.1.2 is independently developed by the receiving party without reference to or use of the Confidential Information of the disclosing party;

9.1.3 is rightfully obtained by the receiving party from a third party without any restrictions or obligations of confidentiality;

9.1.4 is already known by the receiving party without any obligation of confidentiality prior to obtaining the Confidential Information from the disclosing party;

9.1.5 is approved for release in writing by the disclosing party;

cooperate in seeking a protective order and engaging in other such efforts.

**9.2 Protection Period.** Each party's obligations of non-disclosure with regard to Confidential Information are effective as of the date such Confidential Information is first disclosed to the receiving party and will expire two (2) years after termination of this Agreement; however, with respect to any Confidential Information that constitutes a trade secret (as determined under applicable law), such obligations of non-disclosure will survive the termination or expiration of this Agreement for as long as such Confidential Information remains subject to trade secret protection under applicable law.

## 10. LIMITED WARRANTY

**10.1 Limited Warranty.** SmartBear warrants that for the Warranty Period the SaaS or the On-Premise Software, as applicable, will perform materially in accordance with its Documentation. If, during the Warranty Period, the SaaS or the On-Premise Software fails to comply with the limited warranty set forth in this Section 10.1, and such failure is not excluded from this warranty pursuant to Section 10.2, SmartBear shall, at its sole option, repair or replace the SaaS or the On-Premise Software; provided that Customer promptly notifies SmartBear in writing of such failure and provides SmartBear with all information and cooperation SmartBear reasonably requests to resolve the reported failure, including sufficient information to enable SmartBear to recreate such failure. If SmartBear determines that neither repair nor replacement is commercially reasonable, SmartBear may terminate the Order for such On-Premise Software, in its entirety or only with respect to the affected component or part, effective on written notice to Customer, in which case SmartBear shall provide a pro-rata refund of any pre-paid fees. The remedies set forth in this Section 10.1 are Customer's sole remedies and SmartBear's sole liability for breach of the warranty in this Section 10.1.

**10.2 Warranty Disclaimer.** EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 10.1, THE SAAS AND ON-PREMISE SOFTWARE IS PROVIDED "AS IS," AND SMARTBEAR SPECIFICALLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. SMARTBEAR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND TITLE, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE. SMARTBEAR MAKES NO WARRANTY OF ANY KIND THAT THE SAAS, THE ON-PREMISE SOFTWARE, OR ANY OTHER PRODUCTS OR SERVICES OR RESULTS OF THE USE THEREOF WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S OR ENTITY'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY OF CUSTOMER'S OR ANY THIRD PARTY'S SOFTWARE, SYSTEM, OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR-FREE, OR THAT ANY ERRORS OR DEFECTS CAN OR WILL BE CORRECTED.

## 11. INDEMNIFICATION

**11.1 SmartBear Indemnification.** SmartBear shall indemnify and defend Customer and its officers, directors, employees, agents, affiliates, successors, and assigns from and against any Third-Party Claim that the SaaS, On-Premise Software, or any use of the SaaS or On-Premise Software in accordance with this Agreement, infringes or misappropriates such third party's registered patents, its copyrights, or its trade secrets.

### 11.2 Remediation.

11.2.1 If such a Third-Party Claim is made or SmartBear anticipates such a Third-Party Claim will be made, Customer agrees to permit SmartBear, at SmartBear's sole discretion, to

11.2.1.1 modify or replace the SaaS, On-Premise Software, or any component thereof, to make it non-infringing; or

11.2.1.2 obtain the right for Customer to continue use the SaaS or the On-Premise Software, as the case may be.

11.2.2 If SmartBear determines that neither alternative is commercially reasonable, SmartBear may terminate this Agreement, in its entirety or with respect to the affected component or part, effective immediately on written notice to Customer and SmartBear shall provide a pro-rata refund of any pre-paid fees.

11.2.3 This Section 11 sets forth Customer's sole remedies and SmartBear's sole liability and obligation for any actual, threatened, or alleged Third-Party Claims that the SaaS or the On-Premise Software infringe, misappropriate, or otherwise violate any intellectual property rights of any third party.

11.2.4 This Section 11 shall not apply to the extent that any such Third-Party Claim arises out of:

11.2.4.1 Customer's breach of this Agreement;

11.2.4.2 revisions to the Software made without SmartBear's written consent;

11.2.4.3 Customer's failure to incorporate On-Premise Software updates or upgrades that would have avoided the alleged infringement, provided SmartBear offered such updates or upgrades without charges not otherwise required pursuant to this Agreement;

11.2.4.4 SmartBear's modification of the Software in compliance with specifications provided by Customer;

11.2.4.5 use of the Software in combination with hardware or software not provided by SmartBear, unless the Documentation or Specifications refers to a combination with such hardware or software (without directing the user not to perform such a combination); or

11.2.4.6 Customer Data uploaded to the SaaS or On-Premise Software by Customer or its agents.

**11.3 Customer Indemnification.** Customer shall indemnify and defend SmartBear and its officers, directors, employees, agents, affiliates, successors, and assigns from and against any Third-Party Claim:

11.3.1 that the Customer Data, or any use of the Customer Data in accordance with this Agreement, infringes or misappropriates such third party's intellectual property rights; or

11.3.2 resulting from Customer's breach of Section 5.4 (*Excluded Data*).

### 11.4 Indemnification Procedures.

11.4.1 The obligations of the indemnifying party ("Indemnitor") with respect to a claim pursuant to Section 11.1 or 11.3 above (an "Indemnified Claim"):

11.4.1.1 include retention and payment of attorneys and payment of court costs, as well as settlement at Indemnitor's expense and payment of judgments; and

11.4.1.2 will be excused to the extent that the other contracting party's ("Indemnified Party's") or any of such Indemnified Party's Associates' (as defined below) failure to provide prompt notice of the Indemnified Claim or reasonably to cooperate materially prejudices the defense.

11.4.2 Indemnitor will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided Indemnified Party will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations.

11.4.3 A party's "Associates" are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.

OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, FOR ANY LOST PROFITS OR LOSS OF BUSINESS OR FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.

12.2 IN NO EVENT WILL SMARTBEAR'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE EXCEED THE TOTAL AMOUNTS PAID TO SMARTBEAR UNDER THIS AGREEMENT IN THE TWELVE (12) MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

### 13. GENERAL PROVISIONS

**13.1 Export Regulation.** The SaaS and the On-Premise Software utilize software and technology that may be subject to US export control laws, including the US Export Administration Act and its associated regulations. Customer shall not, directly or indirectly, export, re-export, or release the SaaS, the software or technology included in the SaaS or On-Premise Software to, or the On-Premise Software, or make the SaaS, the software or technology included in the SaaS or the On-Premise Software accessible from, any jurisdiction or country to which export, re-export, or release is prohibited by law, regulation, or rule. Customer shall comply with all applicable federal laws, regulations, and rules, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), prior to exporting, re-exporting, releasing, or otherwise making the SaaS, the software or technology included in the SaaS or the On-Premise Software available outside the US.

**13.2 Sanctions and Trade Laws.** Neither Customer nor any of its directors, officers, employees or agents is: (a) the subject or target of any Sanctions; (b) named in any Sanctions-related list maintained by a relevant government entity; (c) located, organized or resident in any country, territory or geographical region which is itself the subject or target of any Sanctions (including, without limitation, Cuba, Iran, North Korea, Syria, and the Crimea, Donetsk, and Luhansk regions of Ukraine) (any such jurisdiction, a "Sanctioned Jurisdiction"); or (d) owned or controlled by any such person or persons described in the foregoing clauses (a)-(c) (any such person described in clauses (a)-(d), a "Sanctioned Person.").

Customer shall not sublicense, distribute, or otherwise make available SmartBear: (a) in any Sanctioned Jurisdiction or to a Sanctioned Person; or (b) in any other manner that would cause any person, including SmartBear, to violate any applicable International Trade Laws. Customer shall not engage in any activity that would cause any other person, including any party to this Agreement, to violate applicable International Trade Laws. None of the execution, delivery, or performance of any obligation of this Agreement, the payment of any amount due under this Agreement, or the consummation of the transactions contemplated hereby would cause any person, including SmartBear, to violate any applicable International Trade Laws. Customer, at all times within the last five (5) years, has conducted its transactions in accordance with all applicable International Trade Laws.

**13.3 Force Majeure.** SmartBear is not liable for delay in the performance of its duties, obligations, or responsibilities hereunder due to force majeure. A force majeure impediment is an event which occurs after acceptance of orders, and which is beyond SmartBear's reasonable control, including without strikes, blockade, war, mobilization, natural disaster, pandemic, epidemic, refusal of license by government, or other stipulations or restrictions by the authorities, internet service failures, delays or availability issues (including downtime or service outages) or any other similar or dissimilar cause beyond the control of SmartBear. Notwithstanding the foregoing, a force majeure does not extinguish Customer's obligations to pay the applicable Fees hereunder.

**13.4 U.S. Government End Users.** This Section 13.4 applies to all access to the SaaS or acquisitions of the On-Premise Software by or for the United States Federal government, including by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the Federal government. The Software and related documentation were developed at private expense and are "Commercial Items", as that term is defined at 48 C.F.R. § 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as such terms are used in 48 C.F.R. § 12.212 or 48 C.F.R. § 227.7202, as applicable. Consistent with and subject to 48 CFR 12.212 and 48 CFR 227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software is being licensed to U.S. Government end users (a) only as Commercial Items and (b) with only those rights as are granted to all other end users pursuant to the terms herein. Any provisions of this Agreement that are inconsistent with federal procurement regulations or other federal law are not enforceable against the U.S. Government. Unpublished rights reserved under the copyright laws of the United States.

**13.5 Governing Law and Jurisdiction.** This Agreement is governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction. Any legal suit, action, or proceeding arising out of or related to this Agreement or the rights granted hereunder will be instituted exclusively in the federal courts of the United States or the courts of the State of New York, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding.

**13.6 Publicity.** Customer grants to SmartBear, during the term of this Agreement, a non-exclusive, worldwide, royalty-free right and license to copy and use Customer's name, logo and other trademarks (as provided by Customer) in SmartBear's customer lists and other marketing or public relations materials; provided that SmartBear observes all guidelines and other instructions or requirements regarding trademark use provided by Customer. All goodwill associated with Customer's trademarks inures solely to Customer, and SmartBear shall take no action to damage the goodwill associated with the trademarks or with Customer.

**13.7 Pre-Printed Terms.** The terms of any purchase order or other document relating to the transactions issued by Customer shall not apply nor supersede the terms of this Agreement or any applicable Order.

**13.8 Notices.** Any notices to SmartBear must be sent to SmartBear's applicable corporate headquarters address set forth in the preamble to this Agreement and must be delivered either in person, by certified or registered mail, return receipt requested and postage prepaid, or by recognized overnight courier service, and are deemed given upon receipt by SmartBear. Notwithstanding the foregoing, Customer hereby consents to receiving electronic communications from SmartBear. These electronic communications may include notices about applicable fees and charges, transactional information, and other information concerning or related to the SaaS or the On-Premise Software. Customer agrees that any notices, agreements, disclosures, or other communications that SmartBear sends to Customer electronically will satisfy any legal communication requirements, including that such communications be in writing.

**13.9 No Waiver.** The invalidity, illegality, or unenforceability of any provision herein does not affect any other provision herein or the validity, legality, or enforceability of such provision in any other jurisdiction. Any failure by SmartBear to act with respect to a breach of this Agreement by Customer or others does not constitute a waiver and will not limit SmartBear's rights with respect to such breach or any subsequent breaches.

**13.10 Dispute Resolution.** In the event of a dispute, prior to initiating any action, Customer shall submit a description of the dispute to the appropriate SmartBear representative ("Dispute Notice"). If the parties are unable to resolve the dispute within ten (10) business days after the Dispute Notice, either party may call for escalation by written notice to the other ("Escalation Notice"). In that case each party shall select an executive with the authority to make commitments that would resolve the dispute, and the two executives shall meet within ten (10) business days after the Escalation Notice and shall negotiate in good faith to resolve the dispute. Except to the extent necessary to prevent irreparable harm or to preserve rights or remedies, neither party shall initiate arbitration or litigation until ten (10) business days after the executives have met to negotiate.

Agreement, without prior written consent, in its entirety in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of either party's assets. SmartBear expressly reserves the right to assign this Agreement and to delegate any of its obligations hereunder.

**13.12 Compliance.** In keeping with SmartBear's compliance program, SmartBear complies with policies covering ethics and business conduct, interest, anti-bribery and corruption, environmental protection, and whistleblower protection. SmartBear's employees are also required to comply with these policies.

**13.13 Entire Agreement.** This Agreement, together with the DPA, AUP, and Order constitutes the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter.

**13.14 Amendment.** SmartBear may amend this Agreement from time to time by posting an amended version at its Terms of Use page on SmartBear's website with the date of the amendment and notifying Customer of the amended version through communications from Customer's SmartBear account manager. Such amendment will be deemed accepted and become effective 30 days after such notice (the "Proposed Amendment Date") unless Customer first gives SmartBear written notice of rejection of the amendment. In the event of such rejection, this Agreement will continue under its original provisions, and the amendment will become effective at the start of Customer's next Renewal Term following the Proposed Amendment Date (unless Customer first terminates this Agreement pursuant to Section 7 (*Term and Termination*)). Customer's continued use of the SaaS of On-Premise Software following the effective date of an amendment will confirm Customer's consent thereto. This Agreement may not be amended in any other way except through a written agreement by authorized representatives of each party, including through an Order as described in Section 13.15 below (*Order of Precedence*). SmartBear may revise the DPA or the AUP at any time by posting a new version on its Website, and such new version will become effective on the date it is posted, provided if such amendment materially reduces Customer's rights or protections, the notice and consent procedures above will apply to the DPA or AUP amendment.

**13.15 Order of Precedence.** If the terms of any attachment to the Agreement or any Order or other purchase document conflicts with the Agreement, the Agreement will control, with the following exceptions:

13.15.1 The DPA will control over the Agreement as to any provision relating to data subject to the DPA.

13.15.2 The parties may modify particular provisions of the Agreement as to that Customer only by setting forth the modified provisions, with a reference to the particular provision of the Agreement being modified and to this Section 13.15 in an Order executed by both parties.